SRI RAM MS SARMA v. UNITED OVERSEAS BANK (MALAYSIA) BHD

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
HADHARIAH SYED ISMAIL JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-03(IM)(NCC)-88-10-2019]
12 SEPTEMBER 2022

Abstract – *A bank as a judgment creditor ('JC'), in order to be a secured creditor, must be shown to hold a security for the debt due to the bank. Where the JC has no security to state, in that, the judgment debtor has not provided any security, the judgment debtor could not raise the application and compliance with s. 5(2) of the Insolvency Act 1967 against the JC.*

BANKRUPTCY: *Creditor's petition – Opposition to – Judgment debtor ('JD') guaranteed grant of banking facilities to company without providing security – Company and JD defaulted in repayment – Whether issuance of creditor's petition in compliance with s. 5(2) of Insolvency Act 1967 – Whether judgment creditor secured creditor – Whether bankruptcy proceedings proceeded on one judgment – Whether judgment creditor's rights of consolidation of JD's accounts could be equated to creating security for facility in issue*

The respondent, the judgment creditor ('JC'), had granted banking facilities to Saron Holdings Sdn Bhd ('Saron'), secured by a guarantee executed by the appellant, the judgment debtor ('JD'), in favour of the JC. The JD did not give any other security to secure the Saron facilities. Saron and the JD defaulted in the repayment of the Saron facilities which led to a filing of a civil suit wherein, the JC obtained judgment against both of them. Saron had since been wound up. The JC thus issued a bankruptcy notice ('BN') against the JD for the entire outstanding sum under the Saron judgment. The BN was served on the JD. There was no compliance and thereby, an act of bankruptcy had been committed. The court subsequently issued a creditors petition ('CP') which was served on the JD. The JD's various attempts to challenge the bankruptcy action were unsuccessful, including his application to stay the bankruptcy action. The Deputy Registrar heard and dismissed the CP. The JC's appeal to the High Court was allowed premised on there being no requirement for compliance with s. 5(2) of the Insolvency Act 1967 ('IA') as the JD had not given any security for the Saron facilities. The adjudicating order and receiving order ('AORO') was entered against the JD. Hence, this appeal by the JD. At around the same time as the Saron facilities, the JC granted banking facilities to Benteng Timur Sdn Bhd for which the JD executed a guarantee in favour of the JC but did not give any other security.

The same scenario as in the Saron facilities happened and the JD had not paid the judgment sum. The JD had also borrowed monies under a personal overdraft from the JC, secured by charges over the JD's lands. A default similarly ensued where the JC sought to enforce its rights as charged. The JD filed an originating summons ('OS') seeking declaratory orders in relation to the JC's rights as chargee as to the redemption sum. The OS was unsuccessful. The thrust of the JD's appeal herein was that: (i) the CP was defective for non-compliance with s. 5(2) of the IA; (ii) the High Court Judge ('HCJ') had failed to uphold the principles of *audi alteram partem* when it disallowed the JD from exhausting all arguments relating to the defective CP; and (iii) the HCJ had erred in the interpretation and application of *res judicata* and principle of estoppel *per rem judicatum*.

Held (dismissing JD's appeal with costs)
Per See Mee Chun JCA delivering the judgment of the court:

(1) Non-compliance with s. 5(2) of the IA is fatal to the CP. The CP was issued on non-compliance with the BN, which was issued on the basis of the Saron judgment. The JD executed a guarantee in favour of the JC as a security for the Saron facilities and did not give any other security. It followed that the JC was not required to make any statement in the CP as required under s. 5(2). The JC was not a secured creditor under the Saron judgment for which it was not required to state either it would give the security up for the benefit of creditors or to state the estimated value, for the reason there was none to state. (paras 12, 18 & 19)

(2) Bankruptcy proceedings can only be proceeded on one judgment. The determination of the application of s. 5(2) was therefore on one judgment, namely the Saron judgment, on which the CP was premised. The JD gave a guarantee and no other security. The JC had the right to consolidate all of the JD's accounts and set off the monies in the credit balance under the OD facilities account against his debt under the Benteng facilities and Saron facilities. The JC was also entitled to include in the redemption sum monies owed by the JD under the two facilities. All these did not equate to creating any security in the OD facilities. Hence, the JD had not provided any security for the Saron facilities such that s. 5(2) of the IA did not apply where the JC had no security to state. (paras 21, 23 & 29)

(3) The JD had every ample opportunity of being heard throughout the bankruptcy proceedings. As the appeal against the dismissal of the CP had been allowed, it followed that the AORO would be made. (paras 31 & 33)

(4) The issue of the application and compliance of s. 5(2) of the IA could have been raised in the various applications filed by the JD, namely, the application to set aside the CP, the appeal to the judge in chambers and the application to stay the CP. This brought *res judicata* to the fore, hence, the JD ought not be allowed to raise the issue. (paras 34 & 35)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Hasnah Che Hasan v. Hongkong Bank Malaysia Bhd [2010] 7 CLJ 190 HC ***(refd)***
M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd [2002] 5 CLJ 25 HC ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam [1993] 3 CLJ 349 SC ***(refd)***
Re: Dr R Ramachandran; Ex-parte: Ganeswary Ponnudurai [2002] 1 LNS 296 HC ***(refd)***
Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal [2018] 2 CLJ 305 CA ***(foll)***

Legislation referred to:

Insolvency Act 1967, ss. 2, 5(2)
Insolvency Rules 2017, r. 89(2)

For the appellant - Rabinder Singh & Cheryl Patricia Fredericks; M/s Rabinder Budiman & Assocs
For the respondent - Ng Sai Yeang & Wong Chee Chien; M/s Raja, Darryl & Loh

[Editor's note: For the High Court judgment, please see Re: Sri Ram MS Sarma; Ex Parte: United Overseas Bank (Malaysia) Bhd [2018] 1 LNS 2207 (affirmed).]

Reported by S Barathi

JUDGMENT

See Mee Chun JCA:

Introduction

[1] On 3 October 2019, the High Court Judge (HCJ) had allowed the appeal of the judgment creditor (JC) against the decision of the Deputy Registrar (DR) which dismissed the creditor's petition dated 4 May 2017. The Adjudicating Order and Receiving Order dated 3 October 2019 (AORO) was entered against the judgment debtor (JD).

Background Facts

Saron Facilities

[2] The JC had granted banking facilities to Saron Holdings Sdn Bhd (Saron). As security for the facilities, the JD had executed a guarantee in favour of the JC. The JD did not give any other security to secure the Saron facilities. Saron and the JD defaulted in the repayment of the Saron facilities which led to a civil suit filed. On 17 December 2013, the JC obtained judgment against them both for RM1,731,249.35 calculated as at 17 July 2013 with interests and costs (Saron judgment). Saron has since been wound up.

[3] On 30 December 2015, the JC issued a bankruptcy notice (BN) against the JD for the entire outstanding sum under the Saron judgment. On 12 February 2016, the BN was served on the JD for which there was no compliance and thereby an act of bankruptcy had been committed. On 4 May 2017, the court issued the creditor's petition (CP). The CP was served on the JD on 24 July 2017.

[4] The above are not disputed facts.

[5] There were various attempts to challenge the bankruptcy action. These were an application filed on 19 February 2016 to set aside the BN, a notice filed on 28 July 2017 to oppose the CP and an application filed on 31 July 2017 to set aside the CP. All the applications were dismissed as were the appeals to the judge in chambers.

[6] On 5 January 2018, the JD filed an application to stay the bankruptcy action which was dismissed on 7 May 2018. The DR proceeded to hear the CP and dismissed it on 30 August 2018. The JC filed an appeal to the judge in chambers which was allowed. Hence this appeal before us.

Benteng Facilities And Personal Overdraft (OD) Facilities

[7] At around the same time as the Saron facilities, the JC granted banking facilities to Benteng Timur Sdn Bhd (Benteng). The JD too executed a guarantee in favour of the JC but did not give any other security to secure the Benteng facilities. The above scenario as in the Saron facilities happened, as in a default and a judgment sum was obtained for RM12,991,357.11. The JD has not paid the judgment sum.

[8] The JD also borrowed monies under a personal OD from the JC. The JD gave charges over his lands as security. A default similarly ensued where the JC sought to enforce its rights as chargee. This time, on 10 July 2014, the JD filed its 2014 OS seeking declaratory orders in relation to the JC's rights as chargee as to the redemption sum. The 2014 OS was dismissed on 28 July 2016 as was the appeal to the Court of Appeal on 13 December 2017 and leave to the Federal Court was likewise dismissed on 17 May 2018.

Decision Of The HCJ

[9] The HCJ had allowed the JC's appeal premised on there being no requirement for compliance with s. 5(2) Insolvency Act 1967 (IA) as the JD had not given any security for the Saron facilities. Further, *res judicata* applied as the JD could have but did not raise the issue of s. 5(2) in its application to set aside the CP, its appeal to the judge in chambers and its application to stay the CP.

The JD's Appeal

[10] The thrust of the JD's appeal is three-fold, namely:

(i) that the CP was defective for non-compliance with s. 5(2) IA;

(ii) that the HCJ had failed to uphold the principles of *audi alteram partem* when it disallowed the JD from exhausting all arguments relating to the defective CP; and

(iii) that the HCJ had erred in the interpretation and application of *res judicata* and principle of estoppel *per rem judicatum*.

[11] We shall now deal with the issues as raised by the JD.

Application Of S. 5(2) IA

[12] Firstly, we do not think there is any dispute that if s. 5(2) IA is not complied with, this will be fatal to the CP. In *M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd* [2002] 5 CLJ 25; [2001] 4 MLJ 67 it was stated at p. 31 (CLJ); p. 73 (MLJ):

> ... Being a secured creditor, the respondent creditor should have stated the truck under the hire purchase agreement as a security at para. 3 in the petition, giving its estimated value or stating that it has a security which it is willing to give up as provided for in a s. 5(2) of the Act. In the present case, the respondent creditor failed to state that in its petition. Section 5(2) of the Act is mandatory in its provision; therefore it must be complied with strictly.
>
> Thus, the failure to comply with the requirement is fatal to the petition. The appeal is allowed with costs and the orders of the learned SAR are hereby set aside. The petition is dismissed.

[13] The issue in this appeal is whether the JC is a secured creditor for the purpose of s. 5(2) IA. It was contended by the JD that the JC was a secured creditor within the meaning of IA such that it must comply with s. 5(2). Section 5(2) IA provides as follows:

> Conditions on which creditor may petition
>
> 5(1) ...
>
> (2) If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

[14] The definition of "secured creditor" in s. 2 is:

> "secured creditor" means a person holding a mortgage, charge or *lien* on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

[15] It is not disputed the JC had not stated any security in the CP. In para. 3 of the CP, the following was stated:

> Bahawa kami atau juga mana-mana orang bagi pihak kami tidak memegang sebarang cagaran ke atas harta penghutang tersebut, atau apa-apa ke atas mana-mana bahagiannya, untuk pembayaran jumlah wang tersebut.

[16] We find that the position in law has been succinctly set out by the Federal Court in *Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam* [1993] 3 CLJ 349; [1993] 2 MLJ 423. At pp. 354 to 355 (CLJ); pp. 432 to 433 (MLJ), this was said:

> In our view, what was crucial here was to determine whether under s. 5(2) the appellant bank as a petitioning creditor was a 'secured creditor' not in the loan agreement with the principal borrower, but under the contract of guarantee with Mr Samuel from which had emanated Mr Samuel's liability in the O. 14 judgment and upon which in turn the bankruptcy notice and petition were based. In short, Mr Samuel was the only 'debtor' in the bankruptcy proceeding before the court on account of the judgment, and his alleged act of bankruptcy was governed by s. 3(1)(i) for non-compliance with a bankruptcy notice. In the circumstances, we are of the opinion that the word 'debtor' appearing in both ss. 2 and 5(2) must mean and should be limited to the actual 'debtor' involved in the particular bankruptcy proceeding and should not include any other debtors that may exist. Thus, in this particular petition, to clothe the appellant bank as a 'secured creditor' under s. 5(2), it must be shown that the appellant bank was holding a mortgage, charge or *lien* on the property of Mr Samuel, as a security for the debt of RM11.2m due to the bank from Mr Samuel. It was common ground that Mr Samuel had not given any security and debenture, were admittedly given by the principal borrower and none by Mr Samuel. In fact, the contract of guarantee executed by Mr Samuel was a third form of collateral or security given to the bank in addition to the landed charge and debenture. Thus, in this particular bankruptcy proceeding as far as Mr Samuel was concerned, the appellant bank was not secured creditor within the meaning of a s. 5(2), and as such non-compliance with its requirement could not be fatal to the petition.

[17] The Federal Court held that whether or not the petitioning creditor was a secured creditor was to be determined not in the loan agreement with the principal borrower but under the contract of guarantee with the respondent from which had emanated the liability. It was further held that for the appellant bank to be a secured creditor, it must be shown that the appellant bank was holding a mortgage, charge or *lien* on the property of the respondent, as a security for the debt due to the bank from the respondent. What is of crucial significance for our appeal here is the further statement that "It was common ground that Mr Samuel had not given any security to the bank for his debt as a guarantor ... the appellant was not a secured creditor" (p. 355 (CLJ); p. 432 (MLJ)).

[18] The same goes in this appeal. It is not disputed that the CP was issued on non-compliance with the BN which was issued on the basis of the Saron judgment. It is further not disputed the JD only executed a guarantee in favour of the JC as a security for the Saron facilities and did not give any other security.

[19] It follows that the JC has was not required to make any statement in the CP as required under s. 5(2). The JC was not a secured creditor under the Saron judgment for which it was not required to state either it would give the security up for the benefit of creditors or to state the estimated value, for the reason there was none to state.

[20] The JD stated he has no issue with the principles enunciated in *Perwira Habib* but has sought to distinguish the case. According to the JD, this appeal has the added dimension of the JC's earlier position that the lands charged to it also secured the banking facilities to Saron (para. 5, affidavit in reply to the JD's 2014 OS, encl. 6/112 to 113), that the lands charged to it are unlimited and continuing securities for all monies due and owing under Benteng facilities, Saron facilities and OD facilities (para. 4, affidavit in reply (3) to the JD's 2014 OS, encl. 6/128) and the position taken in the CP of its right to consolidation (paras. 5 to 6, JC affidavit to CP, encl. 4/64). It was also submitted that the High Court's finding in the 2014 OS that the securities created are intended to be continuing, supports the JD's position.

[21] We note that bankruptcy proceedings can only be proceeded on one judgment. This is made clear by r. 89(2) Insolvency Rules 2017 as follows:

> 89(2) A creditor is not entitled to apply for the issue of a bankruptcy notice by combining two or more final judgments or final orders.

[22] In *Re: Dr R Ramachandran; Ex-parte: Ganeswary Ponnudurai* [2002] 1 LNS 296; [2003] 5 MLJ 84 it was stated at p. 86 as follows:

> ... Why then my rejection of the bankruptcy notice based on the current allocator? I had taken that course of action as I had found that impugned bankruptcy notice wanting, it being founded, *inter alia*, on an allocator, which had subsisted on more than one final judgment or order. It thus had contravened the requirements of bankruptcy law. Statutorily, it is established law that a creditor is not entitled to apply for the issuance of a bankruptcy notice by combining two or more final judgments of final orders, be they from the same suit or not. Rule 91(2) of the Bankruptcy Rules 1969 promulgates as follows:
>
> > A creditor is not entitled to apply for the issue of a bankruptcy notice by combining two or more final judgments or final orders.

[23] The determination of the application of s. 5(2) is therefore on one judgment, namely the Saron judgment, which is what the CP was premised on. The JD gave a guarantee and no other security. The charges were given on the OD facilities. When the JD asked for a redemption sum to discharge the charges, a statement was provided based on the consolidation of the accounts and this cannot amount to providing a security.

[24] In relation to the consolidation as allowed under cl. 34 of the charges, the High Court Judge in the 2014 OS had this to say:

A [62] This argument in my view is without merit. Learned counsel is adding new terms into cl. 34 that the plaintiff had agreed to be bound with. The plain and ordinary reading of cl. 34 provides that the Charges shall not be discharged until the defendant receive payment of not only money secured by the Charges *ie*, the plaintiff's personal Overdraft Facilities that was granted to the plaintiff but also all monies which are owing to the B defendant under any other loans granted to even third parties from time to time, and even if such liability is a collateral one. The judgment the defendant had obtained against Benteng and Saron are evidentiary proof of how much the plaintiff owed the defendant. He is the guarantor for Benteng and Saron ...

C **[25]** This meant the JC's rights of consolidation cannot be equated to creating a security in the charges to secure the Saron judgment.

[26] Further at paras. 68 and 69 of the OS 2014 judgment it was stated:

[68] The decision in *Re: K* [1989] FLR 368 (*Law of Banking Volume 1: Banker & Customer* by Poh Chu Chai at p. 424 to 426) is instructive that a bank D is entitled at any time to combine or consolidate the accounts or to set off all moneys whatsoever due by the bank from its customers. The facts of the case shows that the Bank of India opened two deposit accounts for a customer Mrs F. She was granted an overdraft facility secured against the deposit accounts. In the agreement with the bank, the rights E of the bank were spelt out as follows:

> In addition to the rights which you have in law, you shall also have the right at any time and without prior notice to me to combine and consolidated all or any of my accounts with the bank, and/or to set off all moneys whatsoever due by the bank to me whether on current account or deposit account ... which the bank F may at any time hold ... for my account, against any liability incurred or to be incurred by me to the bank ...

... Otton J in that case said this about the defendant's right to consolidate or combine accounts.

> G In my judgment, the right of the bank to combine is well established and is fundamental to the bank/customer relationship. It is means of establishing the indebtedness of the customers to the bank and the bank to the customers. In exercising this right, a bank is not asserting a claim over the moneys nor is it in conflict with the claims of the Crown. It is merely carrying out an H accounting procedure so as to ascertain the existence and amount of one party's liability to the other. This can only be ascertained by discovering the ultimate balance of their mutual dealing ... Thus it entitles the bank at any time to combine or consolidate the accounts or to set off all moneys whatsoever due by the bank to Mrs F against any liability incurred by her to the bank ...

I

[69] in *Halesowen Presswork & Assemblies L v. Westminister Bank Ltd* [1970] 3 All ER 473, the plaintiff claimed a named sum as money deposited with the defendant bank in one of two accounts maintained by the plaintiff and over which the defendant purported to exercise a right of *lien* on the plaintiffs' voluntary liquidation. On the right of bankers to combine the two accounts so that the bank can set off the debit against the credit, Lord Denning MR held at p. 477:

> I think we should discard the use of the word 'lien' in this context and speak simply of a banker's right to combine accounts; or a right to 'set-off' one against the other.
>
> Using this phraseology, the question in this case is this: suppose a customer has one account in credit and another in debit. Has the banker a right to combine the two accounts so that he can set-off the debit against the credit, and be liable only for the balance? The answer to this question is: Yes, the banker has a right to combine the two accounts whenever he pleases, and set-off one against the other, unless he has made some agreement, express or implied, to keep them separate ...

[27] It was on that premise the JD's OS 2014 was dismissed as the JC had the right to consolidate all of the JD's accounts and set off the monies in the credit balance under the OD facilities account against his debt under the Benteng facilities and Saron facilities. The JC was also entitled to include in the redemption sum monies owed by the JD under the Benteng facilities and Saron facilities. Refer to para. 70.

[28] All these do not equate to creating any security in the OD facilities. The same goes to the securities being unlimited and continuing.

[29] We therefore find that the JD had not provided any security for the Saron facilities such that s. 5(2) IA does not apply where the JC has no security to state.

No Right To Be Heard When AORO Was Made

[30] The JD essentially contended that the merits of the CP had not been determined as at the time the AORO was made, such that he was deprived of his right to be heard. Bankruptcy proceedings are *quasi*-criminal in nature and the strict provisions of bankruptcy law must be complied with (*Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal* [2018] 2 CLJ 305; [2017] 6 MLJ 753).

[31] We certainly agree with the principles expounded in *Sumathy*. In this regard, we however agree with the JC's contention that the JD had every ample opportunity of being heard throughout the bankruptcy proceedings.

[32] The appeal to the judge in chambers further allowed parties to ventilate their case and is by a rehearing. In *Hasnah Che Hasan v. Hongkong Bank Malaysia Bhd* [2010] 7 CLJ 190; [2010] 4 MLJ 241 it has been said at p. 195 (CLJ); p. 248 (MLJ):

> ... An appeal to the judge in chambers, the jurisdiction to review, rescind or vary any order made by the registrar under the bankruptcy proceedings is a rehearing.

[33] As the appeal against the dismissal of the CP has been allowed, it follows as a matter of course the AORO will be made. This obviates the need for the CP to be remitted where there was a rehearing by the judge in chambers.

Res Judicata

[34] We agree that the issue of the application and compliance of s. 5(2) IA could have been raised in the various applications filed by the JD. The HCJ had specifically stated such three applications namely the application to set aside the CP, the appeal to the judge in chambers and the application to stay the CP. Undoubtedly this brings *res judicata* to the fore as per *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 at p. 793 (CLJ); p. 200 (MLJ):

> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata*, *ie* doctrine of estoppel *per rem judicatum*.
>
> We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

[35] The JD ought not be allowed to raise this issue now.

Conclusion

[36] For the reasons given above, we find no appealable error by the HCJ in allowing the JC's appeal. We affirm the decision of the HCJ. We dismiss the JD's appeal with costs of RM5,000 subject to allocator.